

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

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|------------------------------------|---|------------------------------|
| REGAL STONE LIMITED and FLEET |) | Case No. 11-4540 SC |
| MANAGEMENT LTD, |) | |
| |) | ORDER GRANTING PLAINTIFFS' |
| Plaintiffs, |) | MOTION TO CERTIFY ORDER FOR |
| |) | INTERLOCUTORY APPEAL AND |
| v. |) | DENYING DEFENDANT CVS'S EX |
| |) | PARTE APPLICATION FOR |
| LONGS DRUG STORES CALIFORNIA, |) | <u>ADMINISTRATIVE RELIEF</u> |
| L.L.C., a California limited |) | |
| liability company, LONGS DRUG |) | |
| STORES, L.L.C., a Maryland limited |) | |
| liability company, LONGS DRUG |) | |
| STORES CORPORATION, a California |) | |
| corporation, CVS CAREMARK |) | |
| CORPORATION, a Delaware |) | |
| corporation, LOUIE CHESTER, an |) | |
| individual, and DOES 1-20, |) | |
| |) | |
| Defendants. |) | |
| |) | |

I. INTRODUCTION

This Order disposes of two matters currently before the Court. The first is a motion requesting certification for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b), filed on March 27, 2012 by Plaintiffs Regal Stone Limited and Fleet Management LTD's ("Plaintiffs"). ECF No. 42 ("Pls.' Mot."). The Motion is fully briefed. ECF Nos. 43 ("CVS Opp'n"), 44 ("Pls.' Reply"). Plaintiffs' Motion asks the Court to certify for interlocutory

1 appeal an order entered March 2, 2012, in which the Court denied
2 Plaintiffs' motion to remand this case to the California state
3 court in which Plaintiffs initially filed it. See ECF No. 40
4 ("Order").

5 The second matter before the Court is an ex parte application
6 for administrative relief pursuant to Civil Local Rule 7-10, filed
7 on May 1, 2012 by Defendant CVS Caremark Corporation ("CVS"). ECF
8 No 45 ("CVS Ex Parte App."). Plaintiffs filed an opposition brief.
9 ECF No. 47 ("Pls.' Opp'n to Ex Parte App."). CVS asks the Court to
10 order Plaintiffs to immediately serve on all defendants a full and
11 unredacted copy of the operative complaint in this case. See
12 Remand Order at 2-3, 10 n.9 (explaining and accepting Plaintiffs'
13 reasons for not yet having effected such service).

14 For the reasons set forth below, the Court GRANTS Plaintiffs'
15 motion, stays all further district court proceedings in this case
16 pursuant to 28 U.S.C. § 1292(b), and, accordingly, DENIES CVS's ex
17 parte application as moot.

18 19 **II. BACKGROUND**

20 As detailed in the Court's March 2, 2012 Order denying
21 Plaintiffs' motion to remand, Plaintiffs in this case are foreign
22 corporations, and the bulk of the named defendants are domestic
23 corporations incorporated outside California. At least one
24 defendant, a natural person, is a California citizen. Plaintiffs
25 make a variety of state law claims, and originally chose to bring
26 those claims in California state court. Because their complaint
27 contained the private medical information of a non-party who had
28 asserted his California state privacy rights, Plaintiffs, following

1 California rules of court, filed only a heavily redacted version of
2 the complaint. They filed it alongside a motion to seal -- in
3 effect, a motion for a protective order. Plaintiffs never served
4 any of the defendants with the redacted complaint because they were
5 waiting for the state court to rule on the motion to seal. And
6 wait they did. After nearly eight months, several continuances,
7 and at least two amended complaints, defendant CVS specially
8 appeared and removed the case to this Court, notwithstanding
9 Plaintiffs' having joined, but not served, at least one California
10 citizen as defendant. See Order at 2-3. Normally, under the
11 "forum defendant" rule, a case is not removable from state court
12 when a citizen of that state has been "properly joined and served"
13 as a defendant. See 28 U.S.C. 1441(b)(2).

14 This Court observed that other district courts around the
15 nation have split into two camps over how to apply the forum
16 defendant rule when, as here, a forum defendant has been properly
17 joined but not served. Order at 7. One camp favors removal in
18 such circumstances; the other, remand. Id. The Court noted the
19 absence of any appellate authority on the question. Id. The
20 Court, after reviewing the positions of the two camps, decided to
21 follow the weight of authority in its own district, which favors
22 removal. Id. at 11. Accordingly, the Court denied Plaintiffs'
23 motion to remand and retained jurisdiction over the case. Id.

24 25 **III. DISCUSSION**

26 In civil cases, a district court may certify an order for
27 interlocutory appellate review if (1) the order involves a
28 controlling question of law, (2) an immediate appeal of the order

1 may materially advance the ultimate termination of the litigation,
2 and (3) the order involves a question upon which there are
3 substantial grounds for difference of opinion. 28 U.S.C. §
4 1292(b); In re Cement Antitrust Litig., 673 F.2d 1020, 1026 (9th
5 Cir. 1981). Assuming these conditions are satisfied, and subject
6 to the discretion of the Court of Appeals, orders denying motions
7 to remand may be appropriate subjects for interlocutory review.
8 See, e.g., Guglielmino v. McKee Foods Corp., 506 F.3d 696, 698 (9th
9 Cir. 2007); see also Krangel v. Gen. Dynamics Corp., 968 F.2d 914,
10 915 (9th Cir. 1992) (orders granting motions to remand are not
11 subject to appeal, interlocutory or otherwise).

12 Here, the Court's March 2, 2012 Order denying Plaintiffs'
13 motion to remand satisfies the requirements of 28 U.S.C. § 1292(b)
14 and accordingly the Court will certify it for interlocutory appeal.
15 The Order involves a controlling question of law. "[A]ll that must
16 be shown in order for a question to be 'controlling' is that
17 resolution of the issue on appeal could materially affect the
18 outcome of litigation in the district court." In re Cement, 673
19 F.2d at 1026. The precise issue before the Court when it issued
20 the Order was whether removal of a case from state court on
21 diversity grounds was proper when a forum defendant had been
22 properly joined but not served. Resolution of that issue on appeal
23 will determine whether the litigation continues in the district
24 court at all; hence, the question is "controlling" for purposes of
25 28 U.S.C. § 1292(b). Moreover, an immediate appeal of the order
26 would materially advance the ultimate termination of the litigation
27 in the sense that if the motion to remand were granted, the federal
28 courts would cede jurisdiction of this matter to the California

1 state courts, effectively ending federal litigation of this case.
2 Finally, the Court reviewed at length in the Order the substantial
3 grounds for difference of opinion on the issue presented. Indeed,
4 reviewing the district court cases, there is little but difference
5 of opinion, and no appellate court has issued guidance. Thus this
6 condition too is satisfied.

7 CVS's arguments to the contrary are unavailing. CVS
8 characterizes the Order as having done nothing more than applied
9 the plain language of the statute, and argues that the Ninth
10 Circuit could do nothing but the same. Opp'n at 5-7. This flirts
11 with a serious mischaracterization of the content of the Order,
12 which emphasized the lack of clarity in the statutory language.
13 See, e.g., Order at 8 ("[P]lacing one's faith in the removal
14 statutes' clarity became somewhat more difficult when, on December
15 7, 2011, Congress passed the Federal Courts Jurisdiction and Venue
16 Clarification Act of 2011"). Indeed, the Court ordered
17 supplemental briefing because of this perceived lack of clarity.
18 See ECF No. 34. CVS's other primary argument, that the Ninth
19 Circuit cannot fail to agree with this Court, is similarly
20 unavailing. As the Court explained in the Order denying remand,
21 there is a substantial difference of justifiable opinions among the
22 federal district courts, and an absence of appellate authority.
23 Order at 7-8. The Ninth Circuit could endorse the reasoning of
24 cases from outside this district.

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26 **IV. CONCLUSION**

27 The Court GRANTS Plaintiffs Regal Stone Limited and Fleet
28 Management LTD's motion and CERTIFIES for interlocutory appeal the

1 Court's March 2, 2012 Order denying Plaintiffs' motion to remand.
2 ECF No. 40; Regal Stone Ltd. v. Longs Drug Stores California,
3 L.L.C., No. 11-4540 SC, 2012 WL 685756, 2012 U.S. Dist. LEXIS 28115
4 (N.D. Cal. Mar. 2, 2012). The Court STAYS all further district
5 court proceedings in this case for the duration of the appeal. The
6 Court DENIES as moot Defendant CVS Caremark Corporation's ex parte
7 application for administrative relief, seeking an order compelling
8 Plaintiffs to perfect service of the operative complaint.

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10 IT IS SO ORDERED.

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12 Dated: May 4, 2012

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14 UNITED STATES DISTRICT JUDGE
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